

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2747-CR

Cir. Ct. No. 2011CF616

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN C. BROADNAX,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHER and TAMMY JO HOCK, Judges. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. John Broadnax appeals a judgment of conviction for first-degree sexual assault of a child and an order denying postconviction relief. Broadnax argues the sentencing court, the Honorable Sue Bischer, was objectively biased because of comments she made in an interview with the

Green Bay Press-Gazette just before his sentencing. We conclude Judge Bischel's generalized comments do not create an impermissible appearance of bias, and affirm.

BACKGROUND

¶2 Broadnax was charged in a five-count information with first-degree sexual assault of a child under age thirteen, attempted first-degree sexual assault of a child under age thirteen, fourth-degree sexual assault, repeated sexual assault of a child, and second-degree sexual assault of a child. Each count involved a different child. Broadnax reached a plea agreement with the State, pursuant to which he entered a no contest plea to first-degree sexual assault of a child. The remaining charges were dismissed and read in, and the State agreed not to prosecute cases involving two other children. Each side was free to argue at sentencing.

¶3 Sentencing occurred on January 25, 2012, before Judge Bischel. The State observed that, by repeatedly switching lawyers and securing adjournments, Broadnax successfully delayed entering a plea or going to trial for more than two years. The State argued this conduct demonstrated a lack of remorse and, emphasizing the trauma suffered by the many victims, recommended the maximum sentence, forty years' initial confinement followed by twenty years' extended supervision. The defense recommended five years' initial confinement followed by ten years' extended supervision, for a total of fifteen years. After observing that there was "a great discrepancy in the recommendations," the court identified the appropriate sentencing objectives and considered proper sentencing factors. Ultimately, the court imposed a forty-year sentence, with twenty-five

years' initial confinement followed by fifteen years' extended supervision. The court observed this was "effectively Mr. Broadnax's lifetime."

¶4 Just days after sentencing, Broadnax filed a notice of intent to pursue postconviction relief. Broadnax filed his motion in October, after this court granted an extension of time. As grounds for relief, Broadnax asserted he was denied due process because statements Judge Bischel made to the Green Bay Press-Gazette the day before his sentencing hearing created an objective appearance of bias. Broadnax highlighted the following excerpt from a January 24, 2012 article entitled, "Bischel reflects on 20 years on Brown Co. Bench:"

"At sentencing, you think sometimes maybe you can say something that'll make someone's life better going forward," Bischel said.

But after 20 years on the bench, seeing some of the same faces over and over, seeing defendants who apparently care about their futures and families less than she does, Bischel has had enough.

She retires Feb. 2.

"It's so much more complex now—more work and more complex," she said. "The social issues are so overwhelming. I feel like I'm trying to do brain surgery with a hammer and ax. People in the criminal justice system have so many needs ... and so little character. People feel they should be able to do just whatever they want.

"I'm starting to find myself angry at people because they just don't change, no matter how many opportunities you give them. You don't belong in this position if you're fighting off anger."

¶5 Broadnax's postconviction motion was heard before Judge Tammy Jo Hock. The postconviction court concluded Judge Bischel's comments did not give rise to an appearance of bias:

And I think when reviewing the article and you look at the fact that there is this comment that Judge Bischel makes about fighting off anger, and if you are going to just focus—and I don't think it's appropriate just to focus on one portion of the article—but if you focus specifically on that particular portion of the article and that particular quote, to the extent that she is expressing any anger or any frustration in those comments, it really appears that those comments are directed at repeat offenders. And I think then when one looks to whether there is any risk or a great risk of actual bias that was present, you have to then reflect on this particular Defendant. And he was not anyone who had as far as I can tell from reviewing his history ever appeared before Judge Bischel prior to this case.

Accordingly, the court denied Broadnax's motion.

DISCUSSION

¶6 “The right to an impartial judge is fundamental to our notion of due process. *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. We presume a judge has acted fairly, impartially, and without bias. *Id.* This is a rebuttable presumption, though, and rebuttal requires the defendant to prove the existence of either subjective or objective bias. *Id.* Broadnax concedes he cannot show subjective bias.

¶7 Objective bias can take two forms, but only one is at issue here. The first is where there is an appearance of bias. *Id.*, ¶9. The second form “occurs where ‘there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly.’” *Id.* (quoting *State v. McBride*, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994)). Broadnax's only argument is that Judge Bischel's

comments created an objective appearance of bias.¹ “Whether a circuit court’s partiality can be questioned is a matter of law that we review independently.” *Id.*, ¶7.

¶8 In *State v. Gudgeon*, 2006 WI App 143, ¶¶22-23, 295 Wis. 2d 189, 720 N.W.2d 114, this court surveyed the case law and concluded, “Those cases that recognized appearance of partiality as sufficient seemed to do so only where the apparent bias revealed a great risk of actual bias.” Accordingly, “the appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to ‘hold the balance nice, clear and true’ under all the circumstances.” *Id.*, ¶24. In short, “the appearance of partiality constitutes objective bias when a reasonable person could question the court’s impartiality based on the court’s statements.” *Goodson*, 320 Wis. 2d 166, ¶9.

¶9 Broadnax emphasizes four of Judge Bischel’s comments: (1) “People in the criminal justice system have so many needs ... and so little character;” (2) “People feel they should be able to do just whatever they want;” (3) “I’m starting to find myself angry at people because they just don’t change, no matter how many opportunities you give them;” and (4) “You don’t belong in this position if you’re fighting off anger.” He contends these four statements “could

¹ Citing *State v. Marhal*, 172 Wis. 2d 491, 493 N.W.2d 758 (Ct. App. 1992), the State argues that Broadnax has forfeited any right to allege objective bias, and that *Marhal* survived *State v. Carprue*, 2004 WI 111, ¶¶57, 59, 274 Wis. 2d 656, 683 N.W.2d 31, which held that judicial bias is structural error that cannot be waived. Because we conclude Broadnax has failed to demonstrate objective bias, we decline to reach the waiver issue. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court of appeals need not address other issues when one is dispositive of the appeal).

certainly cause a reasonable person to question the impartiality of [Judge Bischel], especially given that those statements appeared on the paper's front page just one day before Broadnax's sentencing hearing, and just nine days before the judge's retirement."

¶10 We disagree that a reasonable person would view Judge Bischel's comments as establishing that the average judge could not be trusted to hold the balance "nice, clear and true" under the circumstances. See *Gudgeon*, 295 Wis. 2d 189, ¶24. Broadnax highlights only a small portion of the Green Bay Press-Gazette article. Immediately preceding the quoted portion of the article, the author wrote that Judge Bischel "got misty-eyed recently while talking about how she cared about the hundreds of criminal defendants who stood before her over the years and their families." Immediately following the passage on which Broadnax relies, the author wrote that Judge Bischel "loved her years on the bench," and quoted Bischel as saying she "felt more suited to be the arbiter, to see both sides," as opposed to an advocate. Taking the article in its entirety, a reasonable person would understand Judge Bischel's comments to mean that she enjoyed being a neutral party and cared deeply for criminal defendants, but was disappointed about the lack of resources available to help defendants and the unwillingness of many to change their behavior.

¶11 In that sense, Broadnax's claim is similar to one made by the defendant in *State v. Carprue*, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31. There, the defendant essentially claimed the trial judge was "anti-defendant" and "harbored general bias in favor of the State in criminal prosecutions" *Id.*, ¶¶60, 63. Our supreme court concluded that only in the most extreme cases would disqualification based on these general allegations of bias be constitutionally required. *Id.* This is not an extreme case, as Judge Bischel's comments do not

demonstrate she held even a generalized bias against criminal defendants. To the contrary, her comments suggest she wished she was better able to assist them.

¶12 Even if we were to take the quotes on which Broadnax relies out of context, as he does, a reasonable person still would not view them in isolation as evincing bias. Judge Bischel’s comments that criminals have generally low character and “feel they should be able to do just whatever they want” do not demonstrate bias. A criminal obviously refuses to conform his or her conduct to the requirements of the law. Her statement that some defendants “just don’t change, no matter how many opportunities you give them,” does not demonstrate a general bias against defendants, either. This comment was clearly directed at recidivists, and, as the postconviction court observed, there is no evidence that Broadnax previously appeared before Judge Bischel. As for those defendants who repeatedly appeared before Judge Bischel, it is obvious they failed to alter their criminal behavior.

¶13 Finally, Judge Bischel’s two references to a generalized sense of anger do not establish bias. Again, these comments referred to her experiences with recidivists, and her further statement about “fighting off” that emotion suggested that she recognized and took steps to mitigate its influence. “[A] judge’s negative comments do not automatically equal bias” *State v. Pirtle*, 2011 WI App 89, ¶34, 334 Wis.2d 211, 799 N.W.2d 492. Expressions of impatience, dissatisfaction, annoyance, or even anger are insufficient to establish bias. *Id.* (citing *Liteky v. United States*, 510 U.S. 540, 555-56 (1994)).

¶14 In sum, Judge Bischel’s comments, when considered in their proper context or even in isolation, do not establish that Broadnax was denied due process. Broadnax has failed to carry his heavy burden of showing that a

reasonable person would view Judge Bischel's statements as revealing an inability to "hold the balance nice, clear and true."

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

